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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re H.A., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. AMANDA A., Defendant and Appellant.	D074448 (Super. Ct. No. EJ4138)

APPEAL from a judgment of the Superior Court of San Diego County, Gary M. Bubis, Judge. Conditionally affirmed and remanded with directions.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, J. Jeffrey Bitticks, Deputy County Counsel, for Plaintiff and Respondent.

Amanda A. (Mother) appeals the judgment terminating her parental rights to her daughter (Daughter). (Welf. & Inst. Code, § 366.26.)[1] Mother contends the San Diego County Health and Human Services Agency (Agency) and the juvenile court failed to fulfill their inquiry and notice obligations under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) and the parallel state law (§ 224 et seq.) (collectively ICWA). We determine the Agency's ICWA notice did not satisfy legal requirements because it did not include known information about Daughter's great-grandparents. We conditionally affirm, but remand for the limited purpose of requiring the Agency to provide the correct notice.

FACTUAL AND PROCEDURAL SUMMARY

Daughter was born in 2010. Three years later, her father (Father) died in a car accident. In 2017, the Agency received information that Daughter was at risk. Daughter was living with Mother, who abused drugs, engaged in prostitution, and was homeless. On March 22, 2017, the Agency filed a dependency petition alleging Daughter was at risk of serious physical harm. (§ 300, subd. (b)(1).)

The next day the court held a detention hearing, during which Mother's counsel said that Daughter "may have Indian ancestry. The father was part On[ei]da. She may have some Choct[a]w." At the end of the hearing, the court directed Mother to "continue to provide information regarding relatives . . . so that the Agency can notice the tribes." Daughter's attorney responded that the matter had previously been in probate

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1 Unspecified statutory provisions are to the Welfare and Institutions Code.

guardianship proceedings where there had been "some tribal noticing done" and said those papers would be provided to the Agency. Mother's counsel then added: "Mother only has the information of the tribe for the father. She can provide information about her own family, but he was the one who really had the main Indian background."

The next month, the Agency prepared a Judicial Council Form ICWA-030 (the Agency ICWA Form). This form identified three possible Choctaw tribes for Mother and two possible Oneida tribes for Father: "Oneida Nation of New York" and "Oneida Tribe of Indians of WI." The form stated that Mother claimed Father "has ancestry with the Oneida Tribes." The form also contained information about Father's parents, including birthdates and information about possible Oneida tribal membership. With respect to Father's father, the form identified two Oneida tribes, but also noted that an Agency social worker had interviewed Father's father and "he denied enrollment with the tribe." The form also identified the Oneida tribes for Father's mother.

But the Agency ICWA Form contained no information as to Mother's or Father's biological grandparents (Daughter's great-grandparents). As detailed below, the ICWA-030 form that had been prepared during guardianship proceedings (Probate ICWA form) did have identifying information as to these great-grandparents.

On April 14, the Agency ICWA Form was sent to various tribes, including the Choctaw and Oneida tribes, and to the Secretary of the Interior and the Bureau of Indian Affairs. Shortly after, the Agency notified the court that it had sent these notices and that it had possession of the Probate ICWA Form prepared during guardianship proceedings.

The court then twice continued the jurisdictional hearing while waiting for the noticed tribes to respond.

During the next several weeks, the Agency received responses from the tribes indicating Daughter was not eligible for tribal enrollment and is not subject to a tribe's jurisdiction. The Choctaw Nation of Oklahoma Tribe said it researched its records based on the information provided and it was unable to establish Daughter's Indian heritage. The Oneida Tribe's child welfare department (with a Wisconsin address) said that "our department has conducted an enrollment search and cannot verify enrollment or eligibility for enrollment" for Daughter, and added that the Oneida Tribe "requires an individual to be at least one-quarter (1/4) degree Oneida Indian blood for tribal membership." The Oneida Indian Nation Tribe (with a New York address) stated that Daughter was not found in its records and is thus not eligible for enrollment in the Oneida Nation.

At the May 23, 2017 contested jurisdiction/disposition hearing, the court sustained the petition and removed Daughter from Mother's custody and placed her with Mother's sister and the sister's husband. The court ordered reunification services and visitations. Based on the Agency ICWA Form notices and the tribes' responses, the court made a finding that ICWA does not apply.

During the six-month review period, Mother did not participate in substance abuse assessment and refused to sign the case plan. Mother's visits with Daughter were sporadic.

In January 2018, the court granted Daughter's petition to terminate Mother's reunification services based on her failure to comply with her case plan and her failure to regularly attend visitations.

On August 2, 2018, the court held a section 366.26 hearing. After considering documentary evidence and counsel's arguments, the court found by clear and convincing evidence that Daughter was adoptable and none of the parental-termination exceptions applied. It ordered Daughter placed with her maternal aunt and uncle as her prospective adoptive parents.

DISCUSSION

The sole issue on appeal concerns whether the Agency provided sufficient information in the Agency ICWA Form to comply with statutory requirements.

A. *Governing Legal Principles*

Our court recently discussed the purpose and history underlying the federal ICWA law and California's enactment of parallel legislation. (*In re E.H.* (2018) 26 Cal.App.5th 1058, 1067-1068 (*E.H*).) We explained that these laws sought to address prior abusive practices, and are intended to promote the connection between Indian tribes and Indian children and to ensure this connection continues when the state seeks to remove an Indian child from his or her parents through dependency proceedings. (*Ibid.*)

We also explained that the statutory inquiry and notice requirements are the foundation for implementing these legislative objectives. (*E.H.*, *supra*, 26 Cal.App.5th at p. 1068; accord, *In re Breanna S.* (2017) 8 Cal.App.5th 636, 649-651 (*Breanna S.*).) "[N]otice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to

determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter." (*Breanna S.*, at p. 649.)

Under federal and state law, a state court must notify an Indian tribe during parental rights termination proceedings if the court knows or has reason to know that an Indian child is involved. (*E.H., supra,* 26 Cal.App.5th at p. 1068; *In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 784.) " 'California law . . . identifies the circumstances that may constitute reason to know the child is an Indian child as including, without limitation, when a person having an interest in the child, including a member of the child's extended family, "provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents or great-grandparents are or were a member of a tribe." ' " (*E.H.*, at p. 1068.) If the Agency knows or has reason to know that an Indian child is involved, the social worker is also required to make further inquiry regarding the child's possible Indian status by contacting individuals who might have information on status or eligibility. (*Ibid.*; *Elizabeth M.*, at pp. 784-785.)

Under these principles, a child welfare agency in California is required to provide information pertaining to a minor's ancestors, including a grandparent, great-grandparent or even a great-great-grandparent "in an ICWA notice if such information may be relevant in establishing the minor's American Indian heritage." (*E.H., supra,* 26 Cal.App.5th at p. 1069.) "California law requires that ICWA notices include '[a]ll names known of the Indian's child's biological parents, grandparents, and great-grandparents, or

Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.' (§ 224.2, subd. (a)(5)(C).) The Judicial Council's mandatory [notice] form . . . , ICWA-030 . . . includes boxes for the required information, including birth date and place, for each parent, each parent's biological mother and father (the child's maternal and paternal grandparents) and each parent's four biological grandparents (the child's maternal and paternal great-grandparents)." (*Breanna S.*, *supra*, 8 Cal.App.5th at p. 651.)

Strict adherence to ICWA notice requirements is essential because " 'a violation renders the dependency proceedings, including an adoption following termination of parental rights, vulnerable to collateral attack if the dependent child is, in fact, an Indian child.' " (*E.H.*, *supra*, 26 Cal.App.5th at p. 1072; *Breanna S.*, *supra*, 8 Cal.App.5th at pp. 653-654.) Courts thus " ' "err on the side of giving notice" ' " to protect the stability of the child's placements by ensuring a thorough examination of " ' "whether the juvenile is an Indian child." ' " (*Breanna S.*, at pp. 653-654.)

B. *Analysis*

In this case, the Agency provided all required information on the Agency ICWA Form regarding Mother and Father and the maternal and paternal grandparents, but it did not provide any information regarding the maternal or paternal great-grandparents. Those boxes were left blank.

The failure to include this information violated applicable law because the Agency had actual knowledge of certain great-grandparent identifying information. (See *E.H.*,

supra, 26 Cal.App.5th at pp. 1068-1072.) The Agency admits it was provided with the Probate ICWA Form prepared by the maternal aunt in the guardianship proceedings, and the Agency included this form as an attachment to a supplemental filing with the court. This Probate ICWA form identified the full name of Father's biological grandfathers (the child's paternal great-grandfathers) and one of Father's biological grandmothers (the child's great-grandmother); and it included the claimed birth date, birthplace, death date, and place of death for one of these grandfathers and one grandmother. For two of Father's grandparents, the words "Does not Apply" appears as the response regarding the Indian Tribe and location, but for one of Father's grandfathers, the tribal information response states "Unknown." For reasons not explained in the record, the Agency did not transfer the identifying information for any of Father's grandparents to the Agency ICWA Form sent to the Oneida tribes.

Additionally, there are no facts showing the Agency conducted any form of investigation regarding the grandparents or great-grandparents, such as asking the paternal relatives about any Indian heritage with respect to these individuals. Although the paternal grandfather denied "enrollment" in a tribe, there was no information as to whether he was *eligible* for enrollment or whether his parents or grandparents were enrolled members or had been eligible to be enrolled. Because Mother's counsel plainly stated Mother was aware of information showing that Father had Indian heritage and identified the particular tribe (the Oneida Tribe), the known information about the child's ancestors should have been provided when inquiring with this tribe. (See *E.H.*, *supra*, 26 Cal.App.5th at pp. 1067-1075 [ICWA notice deficient because agency omitted available

information about dependent child's great-great grandparents]; *Breanna S., supra,* 8 Cal.App.5th at pp. 649-652 [ICWA notices were deficient because agency omitted known information concerning child's grandparents and great-grandparents].)

On the record before us, the Agency failed to comply with the ICWA notice provisions because it did not provide the Oneida Tribes with complete notice of known great-grandparent information.

The Agency's arguments to the contrary are not persuasive. It argues mainly that there was "no credible evidence to indicate that [Daughter] or any of her relatives were members of a tribe or eligible for such membership." It contends that Mother's "mere mention that the father might have some Oneida heritage was not enough to trigger noticing to the tribes." These arguments are not supported by federal and state law. As this court has long made clear, the ICWA notice requirements may be triggered by a mere suggestion or allegation of possible Indian heritage even if the Indian status is not certain. (*Dwayne P.* (2002) 103 Cal.App.4th 247, 254-258; see *In re D.C.* (2015) 243 Cal.App.4th 41, 60.) " ' "The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a *suggestion* of Indian ancestry to trigger the notice requirement." ' " (*In re D.C.*, at p. 60, italics added.) "Synonyms for the term *suggest* include 'imply,' 'hint,' 'intimate' and insinuate.' " (*Dwayne P.*, at p. 258.) Thus, a parent's statement that the child has Indian heritage is generally sufficient to trigger an ICWA notice duty.

The Agency's reliance on *In re O.K.* (2003) 106 Cal.App.4th 152 is misplaced. In *O.K.*, the paternal grandmother indicated her son may have Indian heritage but the

information was vague and she could not identify a tribe. (*Id.* at p. 157.) Here, Mother's counsel told the court at the initial detention hearing that Father had Oneida heritage. The Agency accepted this information by identifying possible Oneida tribes on the Agency ICWA form, but did not include all relevant known ancestral information.

The Agency alternatively argues we should uphold the judgment because the error was harmless. Generally, violation of notice requirements imposed by federal law is reversible per se (with certain exceptions), but the failure to comply with a higher state standard is subject to a prejudice analysis. (See *Breanna S., supra,* 8 Cal.App.5th at p. 653; accord *E.H., supra,* 26 Cal.App.5th at p. 1072.) The Agency appears to have violated federal law because it failed to provide the Oneida Tribe "with complete and accurate notice of the [known] personal identifying information about [Daughter's] 'direct lineal ancestors' . . . who may have had tribal heritage . . . ." (*E.H.,* at p. 1074, quoting 25 C.F.R. § 23.111(d)(3).)

But even assuming the state prejudicial error standard applies, the Agency has not met its burden to show the error was harmless. Because the information showed Father's family may have Oneida heritage, the Agency's failure to include complete information about Father's grandparents in the Agency ICWA Form may have altered the tribe's analysis as to whether Daughter was an Indian child. (See, e.g., *E.H., supra,* 26 Cal.App.5th at pp. 1074-1075 [finding prejudicial error for agency's failure to ask great-grandmother about her father, who was a possible source of American Indian heritage, and specify all relevant information about this great-great-grandparent in the ICWA-030 form]; *Breanna S., supra,* 8 Cal.App.5th at p. 654 [finding ICWA noticing error

prejudicial where reviewing court could not "say with any degree of confidence that additional information concerning [grandparent and great-grandparent] . . . would not have altered the tribe's evaluation"].)

Based on the Oneida Tribe's information that the eligibility criteria required "at least one-quarter . . . degree Oneida Indian blood for tribal membership," the Agency contends it was unlikely that information about Daughter's *great*-grandparents could have affected the analysis of whether she was or could be a tribe member. However, "the Indian Tribe, not the juvenile court or the court of appeal, is the sole entity authorized to determine whether a child who may be an Indian child is actually a member or eligible for membership in the tribe." (*Breanna S., supra,* 8 Cal.App.5th at p. 654*;* accord *E.H., supra,* 26 Cal.App.5th at p. 1075.) It is not a reviewing court's obligation to "determine in the first instance the tribe's membership eligibility requirements," particularly where, as here, "we are without benefit of testimony [or other evidence] regarding how that [requirement] has been applied by the tribe and whether exceptions have been created by tribal custom and practice." (*Breanna S.*, at p. 655.) "[O]nce ICWA notice is required, . . . [courts are reluctant to] foreclose the tribe's prerogative to evaluate a child's membership rights without it first being provided all available information mandated by ICWA." (*Ibid.*)

The Agency's failure to include known identifying information about Daughter's paternal great-grandparents requires that we condition our affirmance of the judgment on the Agency providing correct ICWA notice.

DISPOSITION

The judgment terminating mother's parental rights is conditionally affirmed. We remand for the limited purpose of the Agency providing proper ICWA notice. Upon remand, the juvenile court shall direct that the Agency provide the Oneida tribe or tribes with notice of the proceedings together with accurate information pertaining to all of Daughter's known direct lineal ancestors (including information about the paternal great-grandparents) consistent with applicable law. If, after this notice is provided, the court finds that Daughter is an Indian child, the court shall proceed in conformity with the ICWA. If, after the notice is provided, the court finds that Daughter is not an Indian child, the judgment terminating Mother's parental rights shall be immediately reinstated.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.